by the respondent to the appellant to resell the land to the appellant if the appellant was also to tender the agreed price of $1,000 within three years from 20th June, 1956. That being my view of the transaction that took place in 1956, there can be no question in my mind that the appellant can to-day in the face of the judgment in 1959 claim that he is entitled to specific performance in so far as the second agreement was concerned, that is to say to have the title to the land retransferred to him on his paying the agreed price of $1,000. He has, so the learned trial Judge in this action has found, failed to pay or to be able to pay $1,000 — the agreed purchase price — to the respondent within the contract period and in my opinion there is no equity in his favour for this Court to allow him after the period of three years to ask for specific performance of that particular contract in his favour.

As regards the ground that the present respondent is estopped by his admission in the pleadings from denying that this is an equitable mortgage it seems to me clear if one reads the defence as a whole that the respondent has quite clearly set out that his defence is based on the two agreements which I have referred to and he is not estopped at the trial from relying on both these agreements.

For these reasons I would dismiss this appeal with costs.

Thomson L.P.: I agree with what my Lord has said.

Such rights as accrued to the parties by reason of the 1956 transaction were, in my view, contractual and personal.

In so far as the appellant's claim was capable of being treated in that way in my view it was rightly rejected by the trial Judge for the reasons he has stated. In any event it was for the appellant to raise estoppel and *res judicata* arising from previous proceedings in Civil Suit No. 126 of 1959.

If the appellant had, or thought he had, any rights of any sort whatsoever by reason of the alleged agreement he could and should have asserted his rights in the previous litigation. In my view he is now estopped. On that I would quote a few words from the judgment of Lush J. in the case of *Ord* v. *Ord.*[1] His Lordship dealt with the general question of *res judicata,* and then went on to say:—

> "There is a wider principle....often treated as covered by the plea of *res judicata,* that prevents a litigant from relying on a claim or defence which he had an opportunity of putting before the Court in the earlier proceedings and which he chose not to put forward,"

I also would dismiss the appeal with costs.

Barakbah C.J. (Malaya): I agree and have nothing to add.

Appeal dismissed.

Solicitors: *Jayadeva, Zahir & Izmi*; *Lim Cheng Ean & Co.*

SIM KEE BENG v. BLU

[O.C.J. (McGilligan J.) November 26, 1963]
[Sibu — High Court Civil Suit No. 192 of 1962]

Limitation—Claim for compensation for cutting down trees—Claim based on trespass or trover—Period of limitation—Limitation Ordinance (Sarawak Cap. 49) s. 11, Schedule Items 29, 37.

The plaintiff claimed (it was not clear from the statement of claim whether the action was based on trespass or trover) the sum of $1,428 being cost of compensation for 204 matured sago trees cut and taken away by the defendant, the last cutting of which took place on September 27, 1959. The defendant alleged that the claim was barred by the Limitation Ordinance:

Held: the plaintiff to avoid being barred by the Limitation Ordinance should have started proceedings within 3 years from September 27, 1959 i.e. on or before September 28, 1962 (whether the action be based on trespass or trover) and in this case as his statement of claim was dated December 11, 1962 and the writ of summons issued on December 12, 1962 the action was barred under the said Ordinance.

SUIT.

Plaintiff in person.

S. K. Reddi for the defendant.

McGilligan J.: The Court has now heard the plaintiff's evidence, except that it has not yet finally decided whether or not to admit a statement made by Lukin binti Rajan, deceased, in an earlier case. At any rate, the Court is now in a position to decide (Lukin's statement could not affect this decision) if the plaintiff's claim is barred by the Limitation Ordinance, the defendant having raised the defence of limitation.

In this case the plaintiff claims "$1,428, being cost of compensation for 204 matured sago trees cut and taken away by defendant at $7 per tree", "defendant" means "Lukin binti Rajan", as the legal personal representative of whom the actual defendant, Blu binti Bana, now is party to this case.

It is clear that the claim is in respect of the alleged wrongful cutting down and taking away of trees on the plaintiff's land. But it is not at all clear, either from the statement of claim, or from the plaintiff's evidence, whether the claim is for trespass to land, or is in trover for the value of the trees severed from the land in their character as chattels.

The Court therefore proposes to consider the question of limitation of action; first, treating it as one in trespass, and, second, treating it as one in trover.

Now, on the plaintiff's own evidence it is quite clear that the last cutting of trees must have taken place on or before the 27th of September 1959, the date on which he made his second and last investigation, and found the trees (he said) already cut. Putting it at its best for the plaintiff the Court will assume (for the purposes of this judgment) that the last cutting of trees and their removal from the land took place on the 27th of September 1959.

If the action is for trespass to land, it is item 29 of the Schedule to the Limitation Ordinance (Cap. 49) which is applicable. By it the period of limitation is three years, and the period begins on "the date of the trespass".

If the action is on trover, it is in the opinion of the Court item 37 which is applicable. Item 37 is of a suit "for other specific movable property, or for compensation for wrongfully taking or injuring or wrongfully detaining the same". "Other" means other than the sort of movable property described in item 36 (which when read as a whole cannot possibly be fitted to the circumstances alleged in this case). This claim therefore, if in trover, is in effect for compensation for wrongfully removing specific movable property — i.e. trees which have been cut and severed from the land. The period of limitation is three years and the period begins "when the property is wrongfully taken....".

Therefore, whichever the nature of this action, the plaintiff — to avoid its being barred under the Limitation Ordinance — should have started proceedings within three years from the 27th of September 1959, that is — taking into account section 11 of the Ordinance — on or before the 28th of September 1962. In fact, his statement of claim is dated 11th December 1962, and the writ of summons issued on the 12th of December 1962. The action was therefore begun after the three years period of limitation had expired.

The plaintiff has given various reasons for his delay in bringing proceedings. What he says may very well be true, and the reasons may have seemed good to him (and indeed might to a "reasonable man") but he has neither established or even alleged anything which could have had the effect of stopping the time allowed running.

The plaintiff's claim is dismissed with costs, which the Court will now assess, to the defendant.

Claim dismissed.

Solicitors: *Reddi & Co.*

PUBLIC PROSECUTOR v. GURBACHAN SINGH

[A.Cr.J. (Hepworth J.) December 12, 1963]

[Alor Star — Kedah Criminal Appeal No. 45 of 1963]

Criminal Law and Procedure—Witness a police informer—Payments made by informer to accused—Whether informer an accomplice.

Evidence—Tape recording—Admissibility of—Whether statement made to police officer in the course of police investigation—Principle to be applied—Criminal Procedure Code (Cap. 6), s. 113.

Prevention of Corruption Act, 1961, ss. 4(a) & 15(1) —Burden of Proof.

Trial—Rushed—Observations on.

In May 1963 one Lee, a police informer, reported to the police that an arrangement had been made to pay the sum of $500 per month to the respondent, the O.C.P.D., Jitra, that various payments had been made to him and that a further payment would be made to him in June. These sums were allegedly paid to the respondent so that he might allow lorries carrying fresh fish belonging to certain companies to cross the Thai-Malayan border after 6 p.m. Lee further alleged that one Hashim made the payments to him and he made them to the respondent. Hashim who was called as a prosecution witness stated in evidence that he had no financial dealings with Lee and that he had not been in Lee's shop. The prosecution however adduced evidence to show that a cine-camera and a tape recorder had been installed at Lee's shop and that three prosecution witnesses saw Hashim hand over the money to Lee. The pictures taken by the cine-camera and the tape recordings confirmed this evidence. Evidence was also adduced of the police interrogation of the respondent where he admitted that he had accepted some fish and two motor tyres from the companies. At this stage the learned President stopped the evidence and acquitted the respondent on a charge under section 4(a) of the Prevention of Corruption Act. On appeal by the Public Prosecutor,

Held: (1) Lee was not an accomplice, but his evidence should be subjected to the closest scrutiny and corroborated in material particulars before it could be accepted;

(2) had the learned President correctly assessed the evidence relating to Hashim he would have no hesitation in holding that he was a wholly unreliable witness who was not to be believed and whose evidence should be rejected *in toto;*

(3) the statements made by Hashim and recorded by the tape recorder were admissible although investigation had commenced because they were not made to a police officer and they were not made with a view to avoid the bar of section 113 of the Criminal Procedure Code;

(4) the acceptance of fish or motor tyres is not by itself an offence and such an admission would not amount to a submission to custody. Accordingly, the learned President should not have stopped the evidence at that stage;

(5) the effect of section 15(1) of the Prevention of the Corruption Act is that where a statement is made after the person making it has been arrested, section 26 of the Evidence Ordinance does not apply but proviso (b) to section 15(1) of the Prevention of Corruption Act does;

(6) the burden of proof on an accused person under section 14 of the Prevention of Corruption Act is not higher than that on a party to a civil action to prove his case on the balance of probabilities.

Cases referred to:—

(1) *Lionel de Silva* v. *R.* [1956] M.L.J. 203.

(2) *Tan Yook Suan* v. *R.* [1954] M.L.J. 116.